FILE COPY

FILED
JUN 1 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

TURNER GLASS CORPORATION,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,
OWENS-ILLINOIS GLASS COMPANY,
HAZEL-ATLAS GLASS COMPANY,
CORNING GLASS WORKS,
THATCHER MANUFACTURING COMPANY,
GLASS CONTAINER ASSOCIATION OF AMERICA, INC.,
THE STEVENSON CORPORATION,
Respondents.

No. ~~831~~ 92

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit,

BRIEF IN SUPPORT THEREOF, OPINION OF COURT OF APPEALS, AND MOTION TO DISPENSE WITH PRINTING OF THE RECORD.

JOHN G. RAUCH,
JOHN M. KITCHEN,
PERRY E. O'NEAL,
PATRICK J. SMITH,
ROBERT D. MORGAN,
Attorneys for Petitioner.

RAUCH, WEMMER & CHASE,
THOMPSON, O'NEAL & SMITH,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

PREFATORY NOTE.

The following abbreviations are used by Petitioner:

Corning—Corning Glass Works.

Hartford—Hartford-Empire Company.

Hazel—Hazel-Atlas Glass Company.

Owens—Owens Illinois Glass Company.

P. X.—Petitioner's Exhibit.

Stevenson—Stevenson Corporation.

Thatcher—Thatcher Manufacturing Company.

Toledo Case—United States v. Hartford-Empire Co. et al., 46 F. Supp. 541, 323 U. S. 386, 324 U. S. 570.

Toledo Court—The United States District Court for the Northern District of Ohio, Western Division, trial court of Toledo case.

Turner—Turner Glass Corporation.

INDEX.

Page

Petition for Writ of Certiorari.....1-12

I. Summary Statement of Matter Involved..... 1

II. Statement Disclosing Jurisdictional Basis..... 6

III. Questions Presented 7

IV. Reason Relied on for Allowance of Writ..... 9

Brief in Support of Petition for Writ of Certiorari....13-37

I. Opinion of the Court Below..... 13

II. Jurisdiction 14

III. Statement of the Case..... 14

IV. Assignment of Errors..... 20

V. Argument 23

A. Jurisdiction 23

B. Right of recovery of license fees and royalties 23

C. Misconstruction by Circuit Court of Appeals of Section 5 of the Clayton Act..... 29

D. The Circuit Court of Appeals erred in holding that petitioner "has offered no evidence to prove that it has sustained any pecuniary damage by reason of anything the defendants (respondents) have done"..... 32

E. Reliance upon matters dehors the record—a violation of fundamental right..... 35

Appendix A. Opinion of the Circuit Court of Appeals for Seventh Circuit.....39-48

Motion to Dispense With Printing of the Record.....49-50

TABLE OF AUTHORITIES.

I. Decisions.

American Equipment Co. v. Tuthill Building Material Co., 69 F. (2d) 406 ..... 27, 29

Blount Mfg. Co. v. Yale & Towne Mfg. Co., 166 Fed. 555 26

Bruce's Juices v. American Can Co., 330 U. S. 743 ..... 9, 27, 29

Chattanooga Foundry & Pipe Works et al. v. City of Atlanta, 203 U. S. 390 ..... 10, 29

Columbia Gas and Electric Corporation v. U. S., 151 Fed. 461 35

Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U. S. 227 ..... 9, 26, 27, 29

Divide Creek Irrigation District v. Hollingsworth, 72 F. (2d) 859 36

Funk v. Commissioner of Internal Revenue, 163 F. (2d) 796 36

Hartford-Empire Co. v. United States, 323 U. S. 386, 324 U. S. 570 ..... 2, 4, 9, 16, 17, 18, 20, 24, 25

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U. S. 238 18

Interstate Circuit, Inc., v. United States, 306 U. S. 208 26

Interstate Commerce Commission v. L. & N. R. R. Co., 227 U. S. 88 36

Morton Salt Co. v. G. S. Suppiger Co., 314 U. S. 488 ... 29

Ohio Bell Telephone Company v. Public Utilities Commission, 301 U. S. 292 ..... 11, 36, 37

Paridy v. Caterpillar Tractor Co. (7 Cir.), 48 F. (2d) 166 36

Shawkee Mfg. Co. v. Hartford-Empire Co., 322 U. S. 271 18

Standard Oil Co. v. U. S., 283 U. S. 163.....26, 28
Standard Sanitary Mfg. Co. v. U. S., 226 U. S. 20..... 26

U. S. v. Line Material Co., 92 L. ed. (Adv. Op.) 510...25, 26
U. S. v. National Lead Co., 332 U. S. 319.....25, 29
U. S. v. U. S. Gypsum Co., 92 L. ed. (Adv. Op.) 552.... 25

II. Statutes.

15 U. S. C. A. 1.....2, 24, 40
15 U. S. C. A. 2.....2, 40
15 U. S. C. A. 14..... 40
15 U. S. C. A. 15..... 9
15 U. S. C. A. 16.....4, 7, 30

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

TURNER GLASS CORPORATION, Petitioner, vs. HARTFORD-EMPIRE COMPANY, OWENS-ILLINOIS GLASS COMPANY, HAZEL-ATLAS GLASS COMPANY, CORNING GLASS WORKS, THATCHER MANUFACTURING COMPANY, GLASS CONTAINER ASSOCIATION OF AMERICA, INC., THE STEVENSON CORPORATION, Respondents.	No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

To the Honorable, the Supreme Court of the United States:

Turner Glass Corporation, an Indiana corporation, respectfully petitioning shows the Court:

I.

SUMMARY STATEMENT OF MATTERS INVOLVED.

This is an action under the Anti-trust laws of the United States, to recover treble damages, commenced by Petitioner against Respondents, each of which, except The

Stevenson Corporation, was adjudged to have violated Sections 1 and 2 of the Sherman Act in that they conspired, combined, monopolized and attempted to monopolize and restrain trade and commerce in the glass container industry (15 U. S. C. A. 1 and 2). Hartford-Empire was adjudged to have also violated Section 3 of the Clayton Act. **United States v. Hartford-Empire Co. et al.**, 46 F. Supp. 541; **Hartford-Empire Company et al. v. United States**, 323 U. S. 386, 324 U. S. 570.

Petitioner's glass container manufacturing properties of the appraised value of $1,828,882 (R. 437) were acquired for a nominal sum by one Mandeville, a nominee of a corporation formed by respondents Hartford Empire Co., Thatcher, and Hocking Glass Company (R. 823-824) (subsequently Anchor Hocking Glass Company, not a party here) after Petitioner was placed in receivership upon complaint of respondent Hartford for unpaid license fees and royalties. From 1924 until approximately the time of the receivership, and while the conspiracy, combination and monopoly were in full existence, petitioner paid to Hartford $1,023,828.32 as royalties and license fees which were secretly divided with respondent Owens Illinois Glass, a competitor of petitioner. Petitioner did not learn of the conspiracy, monopoly and combination nor of the secret and preferential division of fees with one of its competitors until the commencement of the government action in **U. S. v. Hartford-Empire Company et al.**, 46 F. Supp. 541 (hereafter referred to as Toledo Case or Toledo Judgment).

Respondents in their answers denied that they had conspired, monopolized or combined or had violated either the Sherman or Clayton Acts. Other defenses were also asserted but are not now material here.

A hearing was had before a Special Master appointed over objection of petitioner. The record consisted of 13,000 pages of testimony and stipulations and 1221 exhibits received in evidence. At the conclusion of petitioner's case the respondents moved to dismiss, then subsequently rested without going forward.

The Special Master made findings and concluded that the law was with the respondents and that petitioner's complaint as amended and supplemented be dismissed (R. 568). Exceptions to the report were filed by petitioner, overruled by the Court, and the findings and conclusions of the Special Master were confirmed without modification.

Judgment was entered for respondents (R. 665).

Petitioner appealed within time to the Circuit Court of Appeals for the Seventh Circuit. Petitioner's properties having been acquired in 1931, by reason of the receivership on the complaint of respondent Hartford, petitioner was without funds to comply with Rule 14 of the said Circuit Court of Appeals which requires that records on appeal be printed. A timely petition was filed with said Court requesting that the said printing rule be waived (R. 2035). The petition was denied (R. 2093). Petitioner then petitioned for permission to present only three questions on a much reduced but unprinted record (R. 2098). This petition was granted (R. 2143).

The Circuit Court of Appeals affirmed the District Court (R. 2155-2162) and held:

> (1) Contrary to the findings and conclusions of the Toledo Court (R. 670) affirmed by this Court (323 U. S. 386), that the license and lease agreements of respondent Hartford, licensing and leasing glass container manufacturing machinery "did not involve the doing

of anything illegal . . ." and "that the licensing agreements were not inherently illegal" (R. 2162).

(2) That the final judgment of the Toledo Court, admitted in evidence here (15 U. S. C. A. 16) was not prima facie evidence of the fact of injury to petitioner's glass container manufacturing business and property by respondents here who were adjudged in the Toledo case to have violated the Anti-trust laws of the United States in a nationwide conspiracy, monopoly and combination in restraint of trade, affecting the entire glass container manufacturing industry, all of which existed while petitioner was engaged in interstate commerce and in manufacturing glass containers, on machinery licensed to it by respondent, Hartford, under illegal license agreements held to be such in **U. S. v. Hartford-Empire Co. et al.**, 46 F. Supp. 541; **Hartford-Empire v. U. S.**, 323 U. S. 386, 324 U. S. 570.

(3) That petitioner "has offered no evidence to prove that it has sustained any pecuniary damage by reason of anything the defendants (respondents) may have done" (R. 2159), when:

(i) The Toledo Court found, and was affirmed by this Court, that in July, 1930 (which was less than six months before Hartford petitioned for a receiver for petitioner), Mandeville (nominee of buyer of petitioner's properties and officer of respondent Thatcher), together with one Griffis, on Griffis' yacht, offered Hartley, President of petitioner "20,000 shares of Thatcher stock to 'send the Turner Glass Company through the wringer' . . ." (R. 824).

(ii) It is stipulated that on December 27, 1930, a receiver was appointed for petitioner upon the

complaint of Hartford based on unpaid license fees and royalties (R. 1039).

(iii) General Glass Corporation, formed by respondents Hartford and Thatcher and Hocking Glass Company, not a party, acquired through its nominee, Mandeville, petitioner's tangible property (R. 823-824) including two glass container manufacturing plants, appraised at $1,828,882 (R. 437), substantial personal property and all of the outstanding common stock of Monongah Glass Company of Fairmont, West Virginia, for $6000 (R. 1110), subject to the lien of a mortgage securing $750,000 of long term bonds, the assumption of taxes in the amount of $24,950 and a five year guarantee of interest on the bonds (R. 1039-1040).

(iv) Petitioner was forced to do business in the face of what Judge Kloeb characterized as a violation of the Anti-trust laws as "deliberate as any that I can find in a review of Anti-trust cases" (46 F. Supp. 541, 553), and by reason of the conspiracy, monopoly and combination petitioner was forced to and did pay respondent Hartford $1,023,828.32 in royalties and license fees from 1924 to 1930 (R. 1033-1036), the year of the receivership, which were secretly shared by Hartford with respondent Owens, a competitor of petitioner (R. 380), and which were paid under and pursuant to licenses and leases which Judge Kloeb concluded as a matter of law were in violation of Sections 1 and 2 of the Sherman Act (R. 840-841; 852-853).

(v) There was an uncontradicted showing by petitioner that after the receivership sale one or more of the respondents had acquired all of petitioner's tangible properties, some of its customers, and some of its key personnel.

Without more such a showing incontrovertibly established pecuniary damage to petitioner's business and property caused by respondents.

Petitioner also presented to the Circuit Court of Appeals the question of the legal propriety of the use by the Special Master in his findings and report, of matter not in the record in the instant case. This matter consisted of certain proposed findings tendered to the Toledo Court by Government counsel in the Toledo case, where petitioner was not a party, and which proposed findings were not adopted by the Toledo trial court. These proposed findings were neither offered nor admitted in evidence in the instant case but were handed to the Special Master by counsel for some of respondents and are set out in full in the report of, and petitioner contends were relied on by, the Special Master. Objections by petitioner to the Master's report asserting the use of matter dehors the record were overruled.

This question was presented to but not passed on by the Circuit Court of Appeals.

II.

STATEMENT DISCLOSING JURISDICTIONAL BASIS.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, Chapter 646, Section 39, 62 Stat. 992, effective September 1, 1948 (28 U. S. C. A. 1254). This petition for certiorari was filed before the expiration of ninety days from March 7, 1949, the date of the decision of the Circuit Court of Appeals (R. 2164).

III.

QUESTIONS PRESENTED.

Upon the record and the opinion of the Circuit Court of Appeals, four important federal questions are involved:

(1) Whether on the undisputed facts petitioner is entitled to recover as damages under the Anti-trust laws, license fees and royalties paid to respondent Hartford and secretly shared by Hartford with respondent Owens, a competitor of petitioner, for use of glass container manufacturing machinery, which payments were made under license and lease agreements adjudged to be illegal, and which payments were made when respondents were engaged in a nationwide conspiracy, combination and monopoly in restraint of trade in the glass container manufacturing field and particularly in a glass container machinery patent monopoly and combination.

(2) Whether under Section 5 of the Clayton Act (15 U. S. C. A. 16) the final judgment against respondents, except Stevenson, admitted in evidence here, adjudging violations of the Anti-trust laws in a nationwide conspiracy, monopoly and combination in restraint of trade and affecting the entire glass container manufacturing industry (and particularly as the judgment is supported by the Toledo findings and conclusions also in evidence here), established the fact of injury to petitioner's glass container manufacturing business and property as a licensee of respondent Hartford under license and lease agreements held to be illegal in the Toledo case.

(3) Whether petitioner can recover damages for injury to its glass container manufacturing business and property based on the following:

(a) Respondents, except Stevenson, were adjudged to have violated the Anti-Trust laws of the United States in a nationwide conspiracy, monopoly and combination in restraint of trade of and affecting the glass container manufacturing industry.

(b) Petitioner at all relevant times paid license fees and royalties to respondent Hartford which Hartford secretly shared with respondent Owens, a competitor of petitioner.

(c) The license and lease agreements under which petitioner paid royalties and license fees to respondent Hartford were adjudged to be inherently illegal and to have been used for an illegal purpose.

(d) Petitioner was placed in receivership upon complaint of respondent Hartford brought for unpaid license fees and royalties claimed due under the illegal license and lease agreements and its tangible property taken over by some of respondents and its business destroyed.

(e) When the receivership was closed all of petitioner's tangible properties and some of its key personnel were in the hands of one or more of respondents.

(4) Whether the Special Master and the Trial Court denied petitioner due process of law in considering and relying upon certain proposed findings of fact submitted by Government counsel to the Toledo Court, where petitioner was not a party, which were not adopted by the Toledo Court, and which were never offered or admitted in evidence and are no part of the record in the instant case, but which are set out

in the report of the Special Master as an ultimate conclusion of fact, which report was confirmed without modification by the Trial Court.

IV.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

(1) The Circuit Court of Appeals for the Seventh Circuit has decided a federal question in a way probably in conflict with applicable decisions of this Court in this, to wit: It decided that the licensing agreements of respondent Hartford relating to glass making machinery were not inherently illegal nor did they involve the doing of anything illegal (R. 2162). The Toledo Court concluded as a matter of law that the license agreements violated sections 1 and 2 of the Sherman Act (Ohio Conclusions 32, 33, R. 840; 34, R. 841; 82, R. 852; 83, 84, R. 853). The findings and conclusions of the Toledo Court were confirmed by this Court (323 U. S. 386, 400, 406).

(2) The Circuit Court of Appeals for the Seventh Circuit in holding that petitioner has no right to recover license fees and royalties paid to respondent Hartford during the existence of a nationwide conspiracy, combination and monopoly in which respondents were engaged in restraint of trade in the glass container industry, has decided a Federal question under Section 15 of the Antitrust laws in conflict with applicable principles announced in decisions of the Supreme Court. It has been adjudicated that petitioner would have had a defense against a suit to recover royalties brought by respondents who were found to have violated the Sherman or Clayton Acts. **Continental Wall Paper Co. v. Louis Voight & Son**, 212 U. S. 227; **Bruce's Juices v. American Can Co.**, 330 U. S. 743. How-

ever, having made the payments wrongfully induced, which were an injury and damage to petitioner's business and property, **Chattanooga Foundry & Pipe Works et al. v. City of Atlanta,** 203 U. S. 390, petitioner's right to recover, given and measured by statute, has been denied contrary to principles announced by this Court.

This is a question of general importance and substance relating to the construction of the Anti-trust laws of the United States and decisions of this Court, and if it is reannunciated that such payments are recoverable as damages in civil actions it will be a substantial deterrent to future violations and of great aid to government authority in the enforcement of the Anti-trust laws.

(3) The construction of Section 5 of the Clayton Act is a question which has not been but should be settled by this Court. The respondents, except Stevenson, were adjudged by the Toledo Court to have violated the Anti-trust laws of the United States in a nationwide conspiracy, monopoly and combination to restrain, and in the restraint of, trade in the entire glass container manufacturing industry in which petitioner was engaged during the time the conspiracy, monopoly and combination were in existence and until petitioner's tangible property and business were sold in a receivership proceedings commenced by respondent Hartford for unpaid license fees and royalties.

The final judgment, findings and conclusions of the Toledo Court were admitted in evidence, the respondents at the conclusion of petitioner's case moved to dismiss, then rested without going forward. Under the circumstances of the instant case the admission in evidence of the said final judgment, findings and conclusions, without regard to petitioner's other evidence, established prima facie the fact of injury through the illegal conspiracy, combination, monopoly and restraint in the glass container

industry, to petitioner's glass container property and business which became conclusive when respondents rested without going forward to rebut such prima facie showing.

(4) The Special Master relied upon and set out in his report, which was affirmed by the District Court, proposed findings of government counsel in the Toledo case, where petitioner was not a party, and which were not adopted by the Toledo Court nor were such proposed findings offered or introduced in evidence in the instant case. Any reliance upon such matter not in this record is a denial to petitioner of the minimal requirements of due process and is in conflict with the decision of this Court in **Ohio Bell Telephone Company v. Public Utilities Commission**, 301 U. S. 292, 305, and comparable cases.

It was contended by the respondents that the so-called rejection by the Toledo Court, of the proposed findings and the findings themselves, even though they were no part of this record, could be properly considered to limit the effect of the Toledo decree under section 5 of the Clayton Act.

This contention is tantamount to asserting that petitioner's action for damages here was decided in the Toledo case, which was an injunctive proceeding brought by the United States and to which petitioner was not a party. Obviously, petitioner had no notice and hearing in the Toledo case as is guaranteed by the Fifth Amendment.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of the Honorable Court directed to the United States Court of Appeals for the Seventh Circuit commanding that Court to certify and to send to this Court for review and determination on a day certain, to be named therein, a full and complete transcript of the record and all proceed-

ings in the case numbered and entitled on the docket of said United States Court of Appeals, No. 9633, and entitled "Turner Glass Corporation, Plaintiff, v. Hartford-Empire Co. et al., Defendants," and that the decree of the United States Court of Appeals for the Seventh Circuit in said cause be reversed by this Court and that petitioner have such other and further relief in the premises as this Court may deem just.

Respectfully submitted,

JOHN G. RAUCH,
JOHN M. KITCHEN,
PERRY E. O'NEAL,
PATRICK J. SMITH,
ROBERT D. MORGAN,
Attorneys for Petitioner.

RAUCH, WEMMER & CHASE,
THOMPSON, O'NEAL & SMITH,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

TURNER GLASS CORPORATION, Petitioner, vs. HARTFORD-EMPIRE COMPANY, OWENS-ILLINOIS GLASS COMPANY, HAZEL-ATLAS GLASS COMPANY, CORNING GLASS WORKS, THATCHER MANUFACTURING COMPANY, GLASS CONTAINER ASSOCIATION OF AMERICA, INC., THE STEVENSON CORPORATION, Respondents.	No. .....

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The case was heard before a Special Master who filed a report (R. 372-568). The District Court overruled petitioner's objections to the report, but neither gave nor filed an opinion. The facts were found specially (R. 570-663) and conclusions of law stated (R. 664).

The opinion of the Circuit Court of Appeals filed on March 7, 1949, appears at pages 2155 to and including 2162 of the record and is reported in 173 F. (2d) 49, and is printed as Appendix A hereto.

II.

JURISDICTION.

A statement particularly disclosing the basis upon which it is asserted this Court has jurisdiction is set out on page 6, infra.

III.

STATEMENT OF THE CASE.

On December 27, 1930, respondent Hartford filed a complaint praying a receiver be appointed for petitioner based on a claim for unpaid license fees and royalties for the use of glass container manufacturing machinery which included feeders, formers, stackers and lehrs (R. 1077-1081). A receiver was appointed by the Federal District Court for the Southern District of Indiana. Upon the receiver's petition the tangible property of petitioner was ordered sold. The receiver's sale was fixed for March 20, 1931. On that day the receiver sold "certain capital stock of Fall Creek Corporation and certain other interests of" petitioner against the Fall Creek Corporation "but received no bid for the other property belonging to" petitioner (R. 1109). The sale was adjourned to April 3, 1931.

On April 3, 1931, the following property of petitioner was offered for sale and sold:

> (a) Two glass container manufacturing plants of petitioner, one at Terre Haute, the other at Winchester, Indiana. The combined properties had been ap-

praised by independent appraisers on a sound value basis after depreciation at $1,828,882.45 (R. 437).

(b) All the personal property of petitioner in the custody of the receiver consisting of machinery, molds, jigs, tools and dies, patents and patent rights, trade marks, licenses, interest in property installed under contracts of lease and/or conditional sale.

(c) The common stock of Monongah Glass Company and of Turner Glass Sales Corporation.

All of the property of petitioner above listed was sold subject to the lien of a certain mortgage securing a bond issue of petitioner, to the sole and only bidder therefor, one Mandeville, for the sum of $6000.00. The purchaser assumed the payment of taxes in the amount of $24,950 and agreed to guarantee interest on the outstanding bonds for a period of five years (R. 1039-1040).

Mandeville was the nominee of General Glass Corporation, a corporation formed in February, 1931, a little more than one month before the said receiver's sale, pursuant to an agreement among respondents Hartford and Thatcher and Hocking Glass Company, not a party here (R. 823-824).

Thus, General Glass Corporation acquired all the physical assets and tangible property of petitioner, and in addition thereto, one or more of the respondents employed some of the key personnel of petitioner (R. 1040, 997-1002). In 1935, approximately five years after General acquired petitioner's property, respondent Thatcher sold its one-half interest in General to the Hocking Glass Company for a profit of $505,000 (R. 1040-1041). General had never operated the Terre Haute plant of petitioner. Thus the profit was made on only the Winchester, Indiana, plant.

Each of the respondents, except Stevenson, was adjudged to have violated the Anti-trust laws of the United

States in the case of **U. S. v. Hartford-Empire**, 46 F. Supp. 541, 323 U. S. 386, 324 U. S. 570. It was not until the commencement of this Government suit that petitioner learned of the conspiracy, monopoly and combination in restraint of trade.

From 1893 to December 27, 1930, the date of the appointment of the receiver, petitioner was engaged in the manufacture and sale of glass containers in interstate commerce. At the date of the receivership it owned a glass container manufacturing plant at Winchester and one at Terre Haute, Indiana, and also owned all of the outstanding common stock of Monongah Glass Company, which also owned a glass container manufacturing plant.

In its early days plaintiff's glassware was made principally by hand. By 1916 there were two commercial methods of manufacturing glass containers which were known as the suction and gob feed processes. By 1922 petitioner was a licensee of the Howard Automatic Glass Machinery Company, which was then licensing feeders in competition with respondent Hartford. At that time there were 43 Howard feeders in the hands of 13 Howard licensees, one of which was petitioner. Hartford had only 16 feeder licensees (R. 692).

Hartford believed that the Howard patent applications dominated certain essential features of its own feeding device and sought to eliminate Howard from competition and thus eliminate a gob feeder which might be used in competition with respondent Corning and also might be used by small producers to continue in business and quote "prices which would be detrimental to the general trade" (R. 692, 693). On June 23, 1922, Hartford acquired the Howard Company through a devious arrangement with Beechnut Packing Company and Hartford Special Ma-

chinery Company (R. 693). The acquisition of the Howard Company by Hartford was held by the Toledo Court to have violated Section 2 of the Sherman Act (R. 846). (See also 46 F. Supp. 541, 557.)

By reason of Hartford's acquisition of the Howard patents and feeders petitioner became a Hartford licensee and continued as such until the receivership on December 27, 1930. In view of all circumstances it can hardly be contended that petitioner voluntarily became a Hartford licensee. Petitioner and its subsidiary, Monongah Glass Company, were licensees under 112 license and lease agreements. Petitioner paid to Hartford as license fees and royalties from 1924 until approximately the middle of 1930, $1,023,828.32 (R. 1033, 1036). On December 27, 1930, Hartford filed a complaint for receiver for petitioner based on unpaid royalties and license fees in the aggregate of $79,926.62 (R. 1038). After the receivership sale which disposed of all of petitioner's tangible property, as hereinbefore set out, petitioner never again engaged in business.

In 1938 the Temporary National Economic Committee of Congress investigated the concentration of economic power (Sen. Doc. No. 95, 76th Cong., 1st Sess. 1939). As a result of this the Government commenced an action on December 11, 1939, in the District Court for the Northern District of Ohio at Toledo against 12 corporate defendants and 101 individual defendants. (Hereinbefore and hereinafter referred to as the Toledo case.) All respondents here were defendants in the Government action but prior to trial the Government dismissed as to the Stevenson Corporation.

The gravamen of the case was that the defendants there had cooperated in obtaining and licensing patents cover-

ing glass making machinery, including that used in manufacturing glass containers, and limited and restricted the use of the patented machinery by a network of agreements and had maintained prices for unpatented glassware (323 U. S. 386 at 392). Each of the respondents here except The Stevenson Corporation was found to have violated Sections 1 and 2 of the Sherman Act and, in the case of respondent Hartford, Section 3 of the Clayton Act.

The Trial Court made 628 findings of fact and stated thereon 89 conclusions of law (R. 670-855). This court affirmed the Trial Court's findings in all matters pertinent here (Hartford-Empire Co. et al. v. U. S., 323 U. S. 386).

It was adjudged that the respondents, except Stevenson, illegally aggregated patents to dominate and control the entire glass container manufacturing industry through restrictive license agreements. At least one of the patents, viz., 1,655,391, under which petitioner was licensed (R. 1563) was procured by respondent Hartford through fraud. **Hazel-Atlas Glass Company v. Hartford-Empire Co.**, 322 U. S. 238; **Shawkee Mfg. Co. v. Hartford-Empire Co.**, 322 U. S. 271.

The Toledo Court in its conclusions of law held that the license and lease agreements violated Sections 1 and 2 of the Sherman Act (Ohio Concls. 31, 32 and 33, R. 840; 34, R. 841; 82, R. 852; 83, 84, R. 853).

Petitioner's license and lease agreements for feeder machines each contained the restrictions and limitations condemned by the Toledo Court in its Conclusions of Law and affirmed by this Court as being violative of the Sherman Act (R. 1362, 1390, 1538, 1564, 1592, 1762, 1791, 1818, 1845, 1883, 1915, 1970). It was under such license and lease agreements that petitioner paid to respondent Hartford over $1,000,000 in royalties and license fees.

The license fees and royalties paid by petitioner to Hartford under these agreements were secretly shared by Hartford with respondent Owens, a competitor of petitioner, for the precise purpose of keeping petitioner (and others) at a competitive disadvantage. Respondent Hartford also gave Owens the right to use 40 feeder and forming machines free of royalty and license fees, which also placed respondent Owens in a dominant competitive position in the glass container industry. The purposes of the arrangements by respondent Hartford were many, but among them were the stabilization of the price of unpatented glassware and the restriction of the production thereof, and to effect a monopoly of all patents relating to glass making machinery and the issuance of licenses thereunder, and to avoid competition in the manufacture of glassware by the adoption of a restricted licensing policy by respondent Hartford (R. 701, 702).

Petitioner under its license and lease agreements from respondent Hartford was at all times prohibited from engaging in the manufacture of so-called heat resistant and other glassware which had been designated as the field belonging to respondent Corning. Petitioner was also prohibited from the manufacture of milk bottles, which was the protected field of respondent Thatcher. Petitioner was prohibited from manufacturing other types and kinds of glassware.

IV.

ASSIGNMENT OF ERRORS.

The Circuit Court of Appeals for the Seventh Circuit erred in each of the following particulars:

1. In denying recovery of damages to petitioner for license fees and royalties paid by it to respondent Hartford, and secretly shared by Hartford with respondent Owens, a competitor of petitioner, under and pursuant to illegal license and lease agreements and during a period of time when Hartford and Owens and the others of respondents were engaged in a nationwide conspiracy, monopoly and combination in restraint of trade in the glass container industry in which petitioner was engaged until its tangible property was sold in receivership commenced on complaint of Hartford for unpaid license fees and royalties.

2. In misconstruing Section 5 of the Clayton Act in holding that the final judgment in the case of **U. S. v. Hartford Empire Company et al.** (46 F. Supp. 541), when admitted in evidence in the instant case, did not establish the fact of injury to petitioner's business and property under the circumstances of this case.

The conspiracy, monopoly and combination in which respondents except Stevenson were adjudged to have been engaged, were nationwide and effected and maintained a restraint of trade in the glass container industry, during the time petitioner was engaged in the said industry. Respondents rested, without going forward after petitioner's case was in. The final judgment, supported by the findings and conclusions of the Toledo Court, when admitted in evidence and without regard to petitioner's other evidence, established prima facie the fact of injury to petitioner's glass container manufacturing business and

property and since unrebutted by respondents is now conclusive on all except Stevenson.

3. In holding that petitioner "has offered no evidence to prove that it has sustained any pecuniary damage by reason of anything the defendants (respondents) may have done."

It is undisputed and uncontradicted that at all material times respondents, except Stevenson, were adjudged to have been in violation of the Anti-trust laws affecting adversely the entire glass container industry of which petitioner was a part.

From 1924 to August of 1930 petitioner paid respondent Hartford more than $1,000,000 in license fees and royalties, which Hartford secretly divided with respondent Owens, a competitor of petitioner. Hartford also secretly permitted Owens to use 40 feeder and former machines free of royalty for the manufacture of glass containers. The secret sharing of royalties paid by petitioner and the free use of manufacturing machinery gave Owens a discriminatory competitive advantage over petitioner.

Petitioner's tangible properties were procured for some of respondents for a nominal sum in a receivership proceeding commenced by Hartford for unpaid license fees and royalties which also unbeknown to petitioner were to be shared with Owens under a secret agreement.

4. In failing to hold that petitioner was denied due process of law in that the Special Master and the Trial Court relied upon matter not a part of the record in the instant proceedings.

In the Toledo case, in which petitioner was not a party, counsel for all parties tendered proposed findings. [Petitioner was not a party to the Toledo case.] The Toledo Court did not adopt many proposed findings including certain proposed findings tendered by government counsel.

Copies of some of these proposed findings tendered by government counsel at Toledo were handed to the Special Master in the instant case by some of counsel for respondents at a pretrial conference. They were never offered nor admitted in evidence in the instant case but were relied upon by the Special Master and set out in full in his report (R. 564-566). Such use of matter outside the record is a denial of due process. The fact that the Toledo Court did not adopt the proposed findings was in no way an adjudication against petitioner. The impropriety of the use of these findings was presented to the Special Master, the Trial Court and the Circuit Court of Appeals.

V.

ARGUMENT.

A. Jurisdiction.

Complete jurisdiction is shown by the record since this is a civil case in the United States Circuit Court of Appeals for the Seventh Circuit. The jurisdiction of the Court is invoked under the Act of June 25, 1948, Chapter 646, Section 39, 62 Stat. 992, effective September 1, 1948 (28 U. S. C. A. 1254). The Petition for Certiorari was filed before the expiration of ninety days from March 7, 1949, the date of the decision of the Circuit Court of Appeals.

B. Right of Recovery of License Fees and Royalties.

The Circuit Court of Appeals erred in denying recovery of damages to petitioner for license fees and royalties paid by it to respondent Hartford.

The Toledo Court adjudged that the respondents, except Stevenson, had violated Sections 1 and 2 of the Sherman Act and in the case of respondent, Hartford, Section 3 of the Clayton Act, in that the said respondents had conspired, combined and monopolized and restrained interstate trade and commerce in the glass container manufacturing industry.

The Toledo Court concluded as a matter of law that the license agreements between respondent Hartford and manufacturers of unpatented glassware, of which petitioner was one, which contained restrictions designed to result in a restriction or stabilization of the production of unpatented glassware and which had that effect, were in violation of Section 1 of the Sherman Act.

Section 1 of the Sherman Act (15 U. S. C. A. 1) provides in part:

> "Every contract in restraint of trade or commerce among the several states is hereby declared to be illegal."

Petitioner became a licensee of Hartford in 1923 by reason of the unlawful acquisition (46 F. Supp. 541, 557) by Hartford of the Howard Automatic Machinery Company, then a competitor of Hartford (R. 692, 693).

Petitioner continued as a Hartford licensee until its receivership upon complaint of Hartford for unpaid license fees and royalties (R. 540, 1033-1036). Petitioner's license and lease agreements with Hartford each contained restrictions held violative of the Sherman Act by the Toledo Court (R. 541, 547-548; actual representative agreements, R. 1362-1999).

As an example, petitioner's license and lease of Hartford's single feeder 277 required it to pay a license fee of $2500, the insurable value of the machine being $2500 (R. 1565); it was for an initial term of eight years with one renewal privilege, title remained in Hartford; the machine could be used only at Winchester, Indiana; it was not assignable, transferable nor could it be sublet. Petitioner was required to pay a minimum royalty of $1500 per year. The schedule of royalties to be paid on number of containers produced which varied with the finished weight, was affixed as a schedule to the license and lease. Petitioner agreed in the license not to dispute the validity of Hartford patents. Hartford had the right to revoke petitioner's license and lease for a violation of any of Sections 1, 3, 6, 7, 8, 9, 10, 11, 12, 13, 15, 20 or 21. This revocation clause placed petitioner always at Hartford's mercy.

This Agreement also contained a specification of unpatented glassware which the petitioner was permitted to manufacture on the leased machinery. Petitioner was prohibited by the licenses from manufacturing various types and kinds of unpatented glassware which were considered by respondents to be the exclusive fields of Corning, Hocking and Thatcher. Petitioner was also prohibited from making certain mold blown glass, certain pressed ware, tumblers, fruit jars, lantern globes, gas globes, chimneys, vault lights, battery jars and containers among others (PX. 1315, p. 24, R. 1561).

Under others of petitioner's licenses and leases it could make bottles for grape juice and unfermented fruit juices, but could not make them for fermented Sacramental wines; it could make bottles for varnish but not for varnish remover; it could make bottles for bluing but not for bleaching fluids and it could make bottles for ink but not for ink eradicators. There were also many others that petitioner was prohibited from manufacturing under penalty of having its licenses cancelled by Hartford.

Petitioner's lehr licenses required it to use the lehr only with Hartford machinery (R. 548-549, 1032).

The restrictions and limitations contained in petitioner's licenses and leases were adjudged illegal and specifically enjoined by the Toledo Court (R. 852-853; para. 19A, R. 886).

Patent grants do not permit the use of the patents to monopolize an industry through royalties drawn from unpatentable products. These royalties collected and the control of production and distribution are in violation of the Anti-trust laws. **Hartford-Empire v. U. S.**, 323 U. S. 386, 406, 443; **U. S. v. U. S. Gypsum Co.**, 333 U. S. 364, 400; **U. S. v. National Lead Co.**, 332 U. S. 319, 367-368; **U. S. v.**

Line Material Co., 333 U. S. 287; **Standard Oil Co. v. U. S.**, 283 U. S. 163, 169-74; **Standard Sanitary Manufacturing Co. v. U. S.**, 226 U. S. 20; **Interstate Circuit, Inc., v. U. S.**, 306 U. S. 208; **Blount Mfg. Co. v. Yale & Towne Mfg. Co.**, 166 Fed. 555.

The Toledo Court stated that:

> "Hartford, by the leverage of its licensing contracts, resting on the fulcrum of its patents, has built a combination that exercised a dominance and control **over the entire glass container industry**, that carry it far beyond the privileges granted in its patents; **it has built up other monopolies not embraced in that granted by the patent**" (46 F. Supp. 541, 616). (Emphasis supplied.)

Not only were the license and lease agreements inherently illegal and void by reason of their restrictive provisions but were also illegal and void under the Anti-trust laws as agreements that were essential parts of an illegal scheme. **Continental Wall Paper Co. v. Louis Voight & Sons Co.**, 212 U. S. 227, 261. The purpose and effect of the conspiracy, combination and monopoly was to control the glass container industry by the unlawful restrictions in the license and lease agreements. These restrictions enforced the division of fields of ware among the conspirators and also restricted production.

It was adjudged by the Toledo Court that Corning was given the heat resistant field and other manufacturers were excluded therefrom by the license agreements. Thatcher was protected in the milk bottle field. Others were protected by Hartford in other fields. Petitioner, as previously pointed out, was prohibited from manufacturing in the Corning, Thatcher and Hocking field. Some of Owens ware was also protected by Hartford under the restrictive covenants.

Thus, the license agreements were an inherent part of an unlawful scheme with their object and effect the accomplishment of illegal ends and therefore void. **Continental Wall Paper Co. v. Louis Voight & Sons Co.**, 212 U. S. 227; **American Equipment Co. v. Tuthill**, 69 F. (2d) 406; **Bruce's Juices v. American Can Co.**, 330 U. S. 743, 755.

The Toledo Court (46 F. Supp. 541, 621) and the Master in this case by quoting from that decision (R. 552-553) found:

> "It is through the licensing and lease system that Hartford retains control over and dominates the industry. It is in this manner that Hartford maintains a system of stabilization of the industry and enforces restrictions and conditions far beyond the privileges of the patent grant."

The findings of fact and the conclusions of law of the Toledo Court adjudged the illegality of the license and lease agreements, both as inherently illegal and as illegal parts of a scheme and plan in violation of the Anti-trust laws.

A portion of the license fees and royalties which petitioner paid to Hartford were secretly shared by Hartford with Owens, a competitor of plaintiff, and in addition to Owens' receipt of these funds from Hartford which were paid to Hartford by Owens' competitors, Owens was given by Hartford the further additional competitive advantage of 40 feeders and formers free of royalties and license fees. This secret sharing of the royalties with Owens and giving it machinery free of charge was for the precise purpose of giving Owens an advantage over its competitors (R. 703-705). The Toledo Court said in this regard that:

"Owens was to have a share in all of the income produced by royalties collected from its competitors. This, of course, had the effect of placing Owens in a position of decided advantage over all other manufacturers of glass products who produced the same lines of ware produced by Owens" (46 F. Supp. 541, 570).

The findings and conclusions of the Toledo Court were sustained by this Court in the following language:

"Little need be said concerning the legal principles which vindicate the District Court's findings and conclusions as to the corporate appellants and the individual appellants who as officers or directors participated in the corporate acts which forwarded the objects of the conspiracy * * *.

"The difference between legitimate use and prohibited abuse of the restrictions incident to the ownership of patents by the pooling of them is discussed in **Standard Oil Co. v. U. S.**, 283 U. S. 163 * * * Application of the tests there announced sustains the District Court's decision. It is clear that, by cooperative arrangements and binding agreements, the appellant corporations, over a period of years, regulated and suppressed competition in the use of glass making machinery and employed their joint patent position to allocate fields of manufacture and to maintain prices of unpatented glassware" (323 U. S. 386, 406).

Thus, petitioner paid royalties and license fees to respondent Hartford which were secretly shared with Owens under agreements intrinsically illegal and also illegal and void as an inherent part of an unlawful conspiracy, combination and monopoly in violation of the Anti-trust laws.

Petitioner is entitled to recover as damages in this action under the Anti-trust laws treble the amount of license

fees and royalties it paid to Hartford and pursuant to the illegal agreements. **Continental Wall Paper Co. v. Louis Voight & Sons**, 212 U. S. 227; **Morton Salt v. G. S. Suppiger Co.**, 314 U. S. 488; **American Equipment Co. v. Tuthill**, 69 F. (2d) 406; **Bruce's Juices v. American Can Co.**, 330 U. S. 743.

The exaction by Hartford from petitioner of the license fees and royalties was illegal and injured petitioner directly in its business and property by requiring the payment of money wrongfully induced. **Chattanooga Foundry & Pipe Works et al. v. City of Atlanta**, 203 U. S. 390, 396.

Mr. Justice Rutledge, concurring with the majority opinion in sustaining the Toledo Court (323 U. S. 386), recognized the merits of petitioner's position when he said at page 443:

> "Every dollar hereafter, as well as heretofore, secured from licenses on the patents illegally aggregated in the combination's hands is money to which the participants are not entitled by virtue of the patent laws or others. It is the immediate product of the conspiracy."

Cf. **U. S. v. National Lead Co.**, 332 U. S. 319, dissenting opinion as to the form of decree at page 367.

To permit recovery as suggested by Justice Rutledge would be of great public importance as a deterrent to violators and would be of substantial and material value in the future enforcement of the Anti-trust laws.

C. Misconstruction by Circuit Court of Appeals of Section 5 of the Clayton Act.

The Circuit Court of Appeals misconstrued Section 5 of the Clayton Act when it held:

"It must be conceded that plaintiff (petitioner) cannot maintain an action under the provisions of section 7 of the Sherman Act unless it has suffered an injury in its business or property by reason of the violation by the defendants (respondents) of some of the prohibitions contained in that Act . . . It must show that it was injured . . . And the mere fact that the defendants have been adjudged guilty in the Toledo case is of no avail to plaintiff unless it establishes that it sustained pecuniary damage . . . The plaintiff must show **personal**, pecuniary damages . . . which must be proved by facts from which their existence is logically and legally inferable . . ." (R. 2158-2159).

Section 5 (15 U. S. C. A. 16) provides in part that:

"A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the Anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto . . ."

The final decree, as well as the findings and conclusions of the Toledo Court, were admitted in evidence in the instant case.

The final judgment of the Toledo Court determined that two or more of the respondents here, except Stevenson (R. 863-865),

(a) "Have contracted, combined and conspired to restrain trade, and have monopolized, attempted to monopolize, combined and conspired to monopolize

trade, in violation of Sections 1 and 2 of the Sherman Anti-Trust Act."

(b) "In violation of Sections 1 and 2 of the Sherman Anti-Trust Act, have monopolized the manufacture of oven ware; have attempted to monopolize, combined and conspired to monopolize, and contracted, combined and conspired to restrain trade in signal, optical, oven, chemical—and heat—resistant ware, and in bulbs, tubing, and cane."

(c) "Have monopolized, attempted to monopolize, combined and conspired to monopolize, and contracted, combined and conspired to restrain trade in violation of Sections 1 and 2 of the Sherman Anti-Trust Act with respect to the manufacture of glass containers."

(d) "Have monopolized, attempted to monopolize, combined and conspired to monopolize and contracted, combined and conspired to restrain trade in violation of Sections 1 and 2 of the Sherman Anti-Trust Act with respect to the manufacture of milk bottles."

The final decree established violations of sections 1 and 2 of the Sherman Act. It likewise established that two or more of respondents had monopolized and restrained trade in the manufacture of glass containers, milk bottles and certain types of ware such as heat and chemical resistant, oven and optical ware, etc.

Petitioner alleged in its amended and supplemental complaint (R. 10) that it "formerly, and during the commission of the acts and the consummation of the combination and conspiracy hereinafter alleged was engaged in the manufacture and sale of glass containers and other glass products in interstate trade and commerce in the United States . . ."

Each of the respondents, except Corning Glass Works, Glass Container Association and The Stevenson Corpora-

tion, admitted that a corporation known as Turner Glass Corporation was until about December 27, 1930, engaged in the manufacture and sale of glass containers in interstate trade and commerce in the United States.

The violations of the Sherman and Clayton Acts, the monopoly and restraints of trade in the manufacture of glass containers were violations of duties owed by respondents to petitioner and others in the glass container industry imposed by the Sherman and Clayton Acts. These violations were established by the Toledo decree since the violations affected the entire glass container manufacturing industry in which plaintiff was engaged. The complaint, answers and Toledo decree established the fact of injury to petitioner at least presumptively. When respondents did not go forward to rebut this presumption of the fact of injury the presumption became conclusive.

D. **The Circuit Court of Appeals Erred in Holding That Petitioner "Has Offered No Evidence to Prove That It Has Sustained Any Pecuniary Damage by Reason of Anything the Defendants (Respondents) Have Done."**

Respondents were adjudged by the Toledo Court to have violated the Sherman and Clayton Acts and to have monopolized and restrained trade in interstate commerce in the entire glass container industry, in which petitioner was engaged.

Petitioner was known in the industry as a price cutter but by virtue of its being a licensee of respondent Hartford the usual strategy employed by respondents to destroy price cutters, viz., expensive litigation charging patent infringement, as is set out in the opinion of the Toledo Court (46 F. Supp. 541), was unavailing. Thus, other means were sought by respondents to get prices under con-

trol by eliminating petitioner. On August 15, 1930, Mandeville, who was the nominee of the purchaser of petitioner's properties at the receiver's sale, went to Indianapolis. As a result of his visit in Indianapolis he wrote Mr. Levis, President of respondent Owens, as follows (R. 2023):

> "I am just back from Indianapolis. I had some of our men there two or three days ahead of me to check up on costs and the figures submitted by Mr. Hartley. We have been at this so long that it was a disappointment to know that he has been fooling himself. This is the best construction I can put on it. I cannot go into the details because I suppose they were given me in confidence. I can say that a major operation is necessary before the Turner Glass Company is in shape for anyone to consider. It must be put through the wringer. I told his executive committee so and we had the figures to prove it.
>
> "Please do not say anything about this to anyone. I told his committee that when they had been through the operation we would be interested in the remains on a proper basis.
>
> **"I am going ahead with some other companies. I wanted to dispose of this company, but it will be some time before anything further can be done.**
>
> "I think Mr. Hartley gets an idea and acts upon it before his facts are demonstrated.
>
> "I am saying nothing about this to anyone but **Mr. McNash** (Pres. of Hazel), and am asking him to keep it to himself." (Emphasis supplied.)

The above letter shows clear intent to destroy petitioner.

The Toledo Court found as a fact that certain representatives of respondents intended "to take over" petitioner. Finding 605 of the Toledo Court (R. 824) was as follows:

"Stanton Griffis was a director of Thatcher from at least September, 1928, until January 1, 1941. In July, 1930, Mandeville wrote Griffis that Thatcher 'cannot correct prices until we get the Turner Company under control' (Ex. 1843). To get Turner under control Mandeville proposed to give Hartley, president of Turner, a block of Thatcher common stock. Shortly thereafter, Hartley was invited by Mandeville and Griffis to Griffis' yacht where Mandeville and Griffis offered him 20,000 shares of Thatcher stock 'to send the Turner Glass Company through the wringer' (R. 5436). After General was formed to take over Turner, Griffis was elected director of that company, and he attended a directors' meeting in April, 1933, at which all of General's contracts were approved."

On December 27, 1930, respondent Hartford filed a complaint against petitioner in the Federal District Court for the Southern District of Indiana, and prayed that a receiver be appointed. The complaint was for unpaid license fees and royalties. A receiver was appointed and in due course petitioner's property was sold to Mandeville, a nominee for a corporation formed pursuant to an agreement among respondent Hartford and Thatcher and Hocking Glass Company, not a party here. As hereinbefore pointed out, all of petitioner's tangible property, including two glass container manufacturing plants and all of the outstanding common stock of a corporation which operated a glass container manufacturing plant in West Virginia, was acquired for a nominal sum. Many of petitioner's key personnel were also taken over by some of the respondents.

Even though petitioner was in financial difficulties the Circuit Court of Appeals has completely overlooked the fact that the payment of excessive and burdensome license fees and royalties under void licenses was a pecuniary

injury to petitioner's business and property, and that no matter that petitioner was in financial straits it still had the right to live. **Columbia Gas and Electric Corporation v. U. S.**, 151 F. (2d) 461. The filing of the complaint for receivership for petitioner by respondent Hartford was at least an overt act in furtherance of the conspiracy, combination and monopoly in which the respondents except Stevenson were adjudged to have been engaged, and which act resulted in pecuniary damage to petitioner's business and property, for which it is entitled to recover.

E. Reliance Upon Matters Dehors the Record—a Violation of Fundamental Right.

In the course of proceedings prior to the trial of this cause respondents handed to the Master certain proposed findings tendered by Government Counsel to Toledo Court which were not adopted by the Court in that case.

Petitioner was not a party to the Government action at Toledo.

These proposed findings, termed by respondents "rejected findings" were never offered in evidence in this case and form no part of the record. Notwithstanding this, they have been urged by respondents in the Trial Court and on appeal as "decisions adverse to plaintiff's claims."

The Master, traveling beyond the record, relied directly upon these rejected findings to support his ultimate conclusion of fact in his finding No. 40 (R. 564) that the Toledo Court did not adjudge that respondents while violating the Anti-trust laws caused any injury to Turner's business or property. In support of this conclusion, he states:

"The Court (Toledo Court) did not make or enter the following Findings of Fact which were requested by the Government, to-wit:"

Set out thereafter in full are certain rejected findings.

The District Court affirmed the Master's findings without modification (R. 665). The question of reliance upon this matter extraneous to the record was squarely presented on appeal (R. 2147-2148). The Court of Appeals' decision by affirming the District Court without reference to the question sanctions the determination based upon these proposed findings which are no part of this record.

The finding of the Master, unsupported by evidence, is arbitrary and baseless. **Interstate Commerce Commission v. L. & N. R. R. Co.**, 227 U. S. 88. Moreover, any consideration of the proposed findings extraneous to the record was improper and constituted prejudicial error. **Parridy v. Caterpillar Tractor Co.**, 48 F. (2d) 166; **Divide Creek Irrigation Dist. v. Hollingsworth**, 72 F. (2d) 859; **Funk v. Commr. of Internal Revenue**, 163 F. (2d) 796.

The reliance upon these rejected findings, not contained in the record, ignores the minimum requirements of a fair hearing assured by due process and constitutes prejudicial error. In **Ohio Bell Telephone Co. v. Public Utilities Company**, 301 U. S. 292, in which the lower court's decision was condemned for reliance upon "findings of a Federal Court • • • which findings were not in evidence," the Court stated, pp. 304-305:

"A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.

• • • • • • •

"The right to such a hearing is one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement."

The Court in the **Ohio Bell** case in reversing held that the Commission made a determination (page 307):

> "Without reference to any evidence, upon proof drawn from the clouds. As there was no warning of such a course, so also there was no consent to it. We do not presume acquiescence in the loss of fundamental rights."

The consideration and reliance upon the proposed findings which are not in the record in this case as a basis for determination is a denial of due process and constitutes such a departure from the accepted and usual course of judicial proceedings, sanctioned by the Circuit Court's acquiescence, as to call for the exercise of this Court's power of supervision.

Petitioner respectfully submits that a Writ of Certiorari should issue to the Circuit Court of Appeals for the Seventh Circuit in the instant case.

Respectfully submitted,

JOHN G. RAUCH,
JOHN M. KITCHEN,
PERRY E. O'NEAL,
PATRICK J. SMITH,
ROBERT D. MORGAN,
Attorneys for Petitioner.

RAUCH, WEMMER & CHASE,
THOMPSON, O'NEAL & SMITH,
Of Counsel.

June 1, 1949.

APPENDIX A.

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

October Term, 1948, January Session, 1949.

No. 9633

Turner Glass Corporation,
Plaintiff-Appellant,
vs.
Hartford-Empire Company, Owens-Illinois Glass Company, Hazel-Atlas Glass Company, Corning Glassworks, Thatcher Manufacturing Company, Glass Container Association of America, Inc., The Stevenson Corporation,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana.

March 7, 1949.

Before Major, C. J., Kerner, J., and Wham, District Judge.

Kerner, J. By this appeal plaintiff challenges the propriety of a judgment dismissing its complaint after a trial upon the merits.

Plaintiff, basing its claim upon a decree entered by the District Court of the Northern District of Ohio (46 F. Supp. 541, affirmed, 323 U. S. 386, and 324 U. S. 570), hereinafter referred to as the Toledo case, sued defendants to recover five million dollars together with treble damages alleged to have been sustained by defendants' viola-

tion of §§1 and 2 of the Sherman Act (15 U. S. C. A. §§1 and 2) and §3 of the Clayton Act (15 U. S. C. A. §14). In the **Toledo** case, the court adjudged the defendants, except The Stevenson Corporation, guilty of a conspiracy, combination and monopoly in obtaining and licensing patents in glass making machinery, and in limiting and restricting the use of the machinery.

Plaintiff's complaint alleged a conspiracy substantially in the language of the **Toledo** complaint, and averred that the restrictive licensing policy of the defendants under their patents, and the royalties and license fees paid by plaintiff to Hartford during the period of the conspiracy, placed plaintiff at a competitive disadvantage which directly caused injury and damage to plaintiff's business and property.

After defendants had filed answers, the cause was referred to a master to take testimony and report the same with his findings of fact, and state his conclusions of law thereon. The master took the testimony of the witnesses, reported more than 13,000 pages of testimony and stipulations, admitted in evidence 1,221 exhibits, and filed his report in which he made 42 findings of fact, among which was one that license fees and royalties had been paid by plaintiff from 1923 to August 4, 1930 under certain license and lease agreements, but concluded that the law was with defendants and recommended that the cause be dismissed. Exceptions to the report were filed and overruled and the report of the master was approved by the court.

The court found inter alia that plaintiff, an Indiana corporation, has, since 1893, been engaged in the manufacture of glass containers, and that prior to 1920 its entire business has been the manufacture of whiskey and beer bottles; that this business was destroyed by the advent of

national prohibition, and that plaintiff was obliged to seek other fields of ware or go out of business. It began the production of various kinds of blown glassware, and during 1920, for the purpose of obtaining better operating results, it equipped its plant with automatic feeders manufactured by the Howard Automatic Machine Company. The use of these feeders did not bring satisfactory results.

In 1923 Hartford became the owner of the Howard patents. During the same year, plaintiff, finding its operating results for prior years so unsatisfactory that its officers and stockholders considered closing the plant, sought and obtained the advice of one Hartley. Thereafter, Hartford and plaintiff entered into license and lease agreements for the use by plaintiff of Hartford's patented machinery and for the servicing thereof. Thereafter it received the benefits which resulted from Hartford servicing the machines used by plaintiff, and plaintiff was in a position to obtain Hartford's most improved equipment. One of the first services rendered by Hartley, who later became president of plaintiff, was to obtain an agreement from Hartford to extend credit to plaintiff for new equipment needed to increase its plant efficiency and production. Acting under Hartley's advice, plaintiff adopted a policy of expansion, sought a wider range of products and an increased production through the acquisition or control of other glassware manufacturers. Favorable results followed. In 1924 it made a net profit of $109,356, and thereafter until the end of the third quarter of 1929 plaintiff had net earnings averaging more than $150,000 per year.

In 1929 the entire glass industry was adversely affected by the severe business depression which began during the summer. Prices declined, and competition became more difficult to meet. Plaintiff decided that it would need improved Hartford equipment in order to speed up and in-

crease its production and reduce overhead costs. It acquired additional feeders and annealing lehrs, in the expectation of obtaining increased volume by concentrating on sales of low-priced ware, and at the end of the first three quarters of 1929 it had earned about $229,000 more than in any prior full year of operation, but for the balance of that year plaintiff suffered steadily mounting losses totalling about $100,000. Losses continued throughout 1930, and by August 1930 it was obvious that plaintiff could not continue unless some method of refinancing could be found. These losses, the court found, could not be attributed to any cause for which defendants had any responsibility or over which they had any control. After a series of negotiations, a meeting of plaintiff's creditors and bondholders was held. Those present agreed that the appointment of a receiver was unavoidable, and a complaint was filed against plaintiff in the United States District Court for the Southern District of Indiana, to which plaintiff filed an answer, and a receiver was appointed. The receiver, having no capital, suspended plant operations and began to arrange a sale. Authority to sell at public auction was procured on December 27, 1930, and on April 3, 1931 the receivership assets were sold subject to confirmation by the court. The court confirmed the sale on April 4, 1931, and thereafter, in May 1932, the receiver's administration of plaintiff was approved, the receivership proceedings were closed and the receiver discharged.

The court also found that the evidence did not establish that Hartford, Owens, Hazel-Atlas, Corning or Glass Container ever engaged in any conspiracy or violated the United States anti-trust laws except as adjudicated in the **Toledo** case, or that any of the defendants caused plaintiff's failure or caused any injury to plaintiff's business

or property, and that in the **Toledo** case, Judge Kloeb had held that "the Hartford royalties have been passed on to the ultimate consumer as a part of the price of glassware."

In this court, pursuant to plaintiff's request and suggestion that only certain questions of law be considered on this appeal, all of the oral testimony and all of defendants' exhibits were omitted from the record, and it now includes only 38 of the 1,221 exhibits: In this state of the record, we must accept the findings as correct. **Carter Oil Co. v. Norman,** 131 F. 2d 451, 456. They cannot be questioned on appeal, **United States v. Title Guarantee & Trust Co.,** 133 F. 2d 990, 995, and **Howard v. Chicago, B. & Q. R. R. Co.,** 146 F. 2d 316, but, of course, if the findings are based on documentary evidence alone, we are permitted to determine any question of fact. **Carter Oil Co. v. McQuigg,** 112 F. 2d 275. Fortunately, there is no question here involving conflicting testimony. The facts are not in dispute.

It must be conceded that plaintiff cannot maintain an action under the provisions of §7 of the Sherman Act unless it has suffered an injury in its business or property by reason of the violation by the defendants of some of the prohibitions contained in that Act, **Jack v. Armour & Co.,** 291 Fed. 741, 745; **Northwestern Oil Co. v. Socony-Vacuum Oil Co.,** 138 F. 2d 967. It must show that it was injured, **Alden-Rochelle v. American Soc. of Composers, etc.,** 80 F. Supp. 888, 897, and the mere fact that the defendants have been adjudged guilty in the **Toledo** case is of no avail to plaintiff unless it establishes that it sustained pecuniary damage. **Keogh v. Chicago & N. W. Ry. Co.,** 271 Fed. 444, 447, and **Twin Ports Oil Co. v. Pure Oil Co.,** 119 F. 2d 747. The plaintiff must show personal, pecuniary damages, **Maltz v. Sax,** 134 F. 2d 2, 5, which must

be proved by facts from which their existence is logically and legally inferable, **Keogh v. Chicago & N. W. Ry. Co.**, 260 U. S. 156, 165. Without actual damages to plaintiff, there can be no recovery. **Maltz v. Sax**, supra, and **Beegle v. Thompson**, 138 F. 2d 875, 881.

Plaintiff says it has suffered an injury. It has offered no evidence to prove that it has sustained any pecuniary damage by reason of anything the defendants may have done. We have already observed that Judge Baltzell found that the evidence failed to establish that any of the defendants caused plaintiff's failure or caused any damage to plaintiff's business or property. He found as a fact that before plaintiff became a Hartford licensee, its operating results had been unsatisfactory, and that it was not until plaintiff received Hartford service on its Howard machines that satisfactory results ensued. However, in its briefs plaintiff contends that the payment of the license fees and the entry of the judgment in the **Toledo** case was evidence of pecuniary damage, and upon oral argument its counsel stated that if the license agreements are legal, plaintiff "is out." We take this to mean that, in the event we hold that the agreements are not inherently illegal, the judgment must be affirmed. Accordingly we address ourselves only to that contention.

To be sure, for the purposes of this case, the conspiracy to violate the anti-trust laws found at Toledo is established, and, of course, an agreement essentially a part of a scheme to fix the price or curtail the quantity of an unpatented ware would be in violation of the anti-trust laws, **Continental Wall Paper Co. v. Louis Voight and Sons**, 212 U. S. 227; **American Equipment Co. v. Tuthill**, 69 F. 2d 406, 409; and **United States v. Line Material Co.**, 333 U. S. 287. But a patentee may grant a license upon any condi-

tion if its performance is reasonably within the reward which the patentee is entitled to secure. **United States v. General Electric Co.**, 272 U. S. 476, 489.

Our study of the **Toledo** case has not convinced us that the inherent illegality of the agreements in our case was considered or decided in that case. We find no language in either opinion of the Supreme Court relating to inherent invalidity of the agreements. It is true, however, that Judge Kloeb said: "* * * a license and lease system may be perfectly legal and just if properly used. However, in the instant case, there has been a deliberate abuse and misuse of that system" (46 F. Supp. 621). In using the quoted language we think the illegality found was that of the licensing system as a whole, in view of the manner in which the court found that it had been used. It in no manner was dependent on illegality of the agreements here involved.

We believe we find the solution of our problem in what was said in **Gasoline Products Co. v. Champlin Refining Co.**, 46 F. 2d 511, and cases cited therein.

The plaintiff in the **Gasoline Products** case sued defendant to recover royalties under a license agreement. Defendant, as in our case, contended that the agreement was illegal because plaintiff was engaged with others in a conspiracy to violate the anti-trust laws by means of a patent pool for the purpose of establishing a monopoly, fixing prices, controlling the market and extorting huge profits from defendant and others engaged in the manufacture of cracked gasoline, and that the license agreement was issued in furtherance of the illegal combination. The court in rejecting the defense, at page 514 said: "As the contract is admittedly valid on its face, involving the doing of no wrongful act, by its terms an ordinary and

legitimate business transaction, between parties authorized to contract, it is apparent that the defendant, who voluntarily entered into it, must go somewhere back of and outside of the contract to show its illegal nature. This it does or attempts to do by pointing out that the combination was formed for the purpose of stifling competition and fixing prices in its cracking business; and that the contract sued on partakes of the illegal purpose of the plaintiff, is an essential part of its wrongful scheme, and is a method of carrying it out and reaping the profits made possible by the monopoly.

"The defendant was not a party to the cross-license agreements and I can see no force in the argument that the mere purchase of a sublicense from the alleged illegal combination makes the purchaser a party to it.

"The contract in suit is complete in itself, involves the doing of nothing illegal, and is enforceable without reference to any other agreement. I fail to see how there can be any illegality 'inherent' in one contract when it is necessary to go wholly outside of it and into another contract to find illegality."

We find additional support for the proposition that the courts recognize the distinction between inherent and collateral illegality arising out of anti-trust law violations. **Bruce's Juices v. American Can Co.**, 330 U. S. 743, was an action to recover on notes given for the purchase price of cans. The defendant pleaded that the consideration for the notes was illegal and the notes void because plaintiff had violated the Robinson-Patman Act. In holding that recovery on the notes could not be defeated by the defense asserted, the court, at page 755, said: "This Court has held that where a suit is based upon an agreement to which both defendant and plaintiff are parties, and which

has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought, the Court will entertain the defense that the contract in suit is illegal under the express provision of that statute [Sherman Anti-Trust Act]. • • • But when the contract sued upon is not intrinsically illegal, the Court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit • • •."

In our case, Hartford was the owner of the patents. Their validity was not challenged in the **Toledo** case, nor is their validity attacked here, hence Hartford had the right to lease the machinery covered by the patents. Having that right, and plaintiff desiring to use the machinery, it voluntarily entered into agreements which conferred upon it the right to use the leased machinery in the United States, for the manufacturing of glassware defined as "Permitted Ware." Limiting the use of leased machinery is within the prerogative of a patentee. Compare **General Talking Pictures v. Western Electric Co.**, 305 U. S. 124. The agreements were complete in themselves, and by the agreements plaintiff secured Hartford's property and received all the benefits of the use of the machines for which it paid the agreed license fees and royalties. The agreement did not fix prices so as to come within the rule enunciated in **United States v. Line Material Co.**, supra, or limit the quantity of ware that plaintiff could produce, or the markets in which plaintiff's glassware could be sold. See **American Equipment Co. v. Tuthill**, supra. They did not involve the doing of anything illegal, and each of the agreements was enforceable without reference to any cross-license agreement or agreements into which the defendants might have entered among themselves.

Under these circumstances we are impelled to the conclusion that the licensing agreements were not inherently illegal. Accordingly the judgment of the District Court is affirmed.

A True Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

TURNER GLASS CORPORATION,
Petitioner,

vs.

HARTFORD-EMPIRE COMPANY,
OWENS-ILLINOIS GLASS COMPANY,
HAZEL-ATLAS GLASS COMPANY,
CORNING GLASS WORKS,
THATCHER MANUFACTURING COMPANY,
GLASS CONTAINER ASSOCIATION OF AMERICA, INC.,
THE STEVENSON CORPORATION,
Respondents.

No. .....

MOTION TO DISPENSE WITH PRINTING OF THE RECORD.

Petitioner respectfully moves the Court and requests that the requirements of paragraph 7 of Rule 38 of the rules of this Court be dispensed with and the record not be printed for consideration of the Court.

The record was not printed in the Circuit Court of Appeals pursuant to order of Court (R. 2143) made on petitioner's motion for a waiver of the rule requiring printing.

Petitioner has not been engaged in business since its property was sold in a receivership proceedings commenced by complaint of respondent Hartford. It has no

funds or other available assets except this cause of action.

None of the stockholders of petitioner who are listed in the record (R. 2137) is singly or are together, able, so far as can be determined, to advance funds to defray the costs of printing. The above statement does not apply however, to approximately nine shareholders (who own 17,050 shares of petitioner) and each of whom has been or now is connected with one or more of respondents (R. 2139).

Counsel believe that petitioner has a meritorious cause of action and that the questions presented by its petition are of substantial importance.

Counsel for respondents have an unprinted record, conformed to the record lodged with the Clerk of this Court, available for their use. Two complete additional copies of the unprinted record have been lodged with the Clerk of this Court.

Wherefore, petitioner prays its petition for a writ of certiorari may be determined on the record lodged with the Clerk of this Court and that the requirements of paragraph 7 of Rule 38 be dispensed with for such determination.

Respectfully submitted,

JOHN G. RAUCH,
JOHN M. KITCHEN,
PERRY E. O'NEAL,
PATRICK J. SMITH,
ROBERT D. MORGAN,
Attorneys for Petitioner.

RAUCH, WEMMER & CHASE,
THOMPSON, O'NEAL & SMITH,
Of Counsel.